IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03/12/2004

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The Honourable Mr. Justice V. KANAGARAJ

W.P. No.9745 of 1997 and W.P.No. 9746 of 1997
and
W.M.P.No. 15507 of 1997

Shriram General Finance
-(P) Limited,
rep. by its Director ... Petitioner in both W.Ps.

-Vs-

The Regional Provident
Fund Commissioner,
No.20, Royapettah High Road,
Madras 600 014. ... Respondent in both W.Ps.

Petitions under Article 226 of The Constitution of India,
praying to issue a writ of certiorari and writ of certiorarified mandamus
respectively.

For Petitioner : Mr. Manohar Gupta

For Respondents : Mr. K. Gunasekar

:COMMON ORDER
W.P. No.9745 of 1997 has been filed praying to issue a writ of certiorari, to call for the records and quash the order bearing Ref.TN/19 904/SDC-2/97 dated 12.6.1997 on the file of the respondent.

2. W.P. No.9746 of 1997 has been filed praying to issue a writ of certiorarified mandamus, to call for the records and quash the order bearing Reference No.D 5/TN/MS/19904-A/REGL/95 dated 16.10.1995 on the file of the respondent and consequently direct the respondent to treat the petitioner as an independent establishment for the purpose of coverage under the Employees Provident Fund and Miscellaneous Provisions Act,1952.

3. Today, when the above matter was taken up for consideration, learned counsel for the petitioner would submit in respect of W.P. No.97 45 of 1997 that the petitioner is the Company incorporated under the Indian Companies Act on 14.10.1988; that though the Company was incorporated on 14.10.88, the Company started functioning only from January,

1993; that in May, 1994, the Company recruited five employees and the staff strength started with five recruitment that in November, 19 94, due to re-organisation in Shriram Group Companies,a few employees in Shriram Investments Limited were rendered surplus; that the employees in Shriram Investments Limited were transferred to the petitioner-Company and consequently, the establishment was deemed to be covered under the Employees Provident Fund Act (hereinafter referred to as "the Act") from November, 1994; that the petitioner-Company applied for an allotment of code number to remit the P.F. Contributions vide their letter dated 23.12.1994; that as there was delay in the allotment of the code number, the amount deducted for P.F. contributions from the employees along with the employer's contribution was deposited in a separate bank account exclusively opened for this purpose and the said amount was not utilised in any manner whatsoever; that in view of the repeated reminders by the Company to allot a separate code number, Sri C. Srinivasan, Enforcement Officer held discussions with the Company's Officers on 23.9.95 and 27.9.95 and informed the Company' s Officers that the petitioner-Company cannot be treated as an independent unit and separate code number could not be granted and he wanted the Company to apply for the allotment of a sub code number; that the petitioner-Company applied for a sub code number with effect from 1 .5.1994 vide their letter dated 27.9.1995 and clearly stated that they are applying for sub code only under the instructions of Mr. C. Srinivasan, Enforcement officer and that the Provident Fund Authorities allotted a sub code number with effect from 14.10.1988 by their order dated 16.10.1995.

4. Learned counsel for the petitioner would further submit that on allotment of sub code, the petitioner-Company remitted the contributions on 19.3.1996 with a delay of five months in depositing the contribution, due to administrative reasons; that the respondent issued a letter dated 7.10.1996, calling upon the petitioner to show cause as to why damages should not be levied under Section 14-B of the Act for delayed remittance of contribution; that the petitioner submitted a detailed reply dated 9.1.1997 and attended the personal hearing; that the respondent, after hearing the arguments and going through the reply submitted by the petitioner, passed an impugned order on 12.6.1997 , levying damages to the tune of Rs.4,29,169/-, failing which action will be taken under Section 8 of the Act and hence would seek for the relief extracted supra.

5. In support of his submissions, learned counsel for the petitioner has relied on the decision reported in SHANTHI GARMENTS v. REGIONAL P.F. COMMR. (VOL.101 F.J.R. 997) and referred particularly page 1000 last paragraph.

6. Learned counsel for the petitioner would submit in respect of W.P. No.9746 of 1997 that there is no provision in the Act to allot a sub code number with retrospective effect; that before allotting a sub code the respondents have to issue notice, but no notice was given to the petitioner; that the petitioner-Company had no employee from 1 988 to November, 1994; that in the absence of any employee, the question of functional integrality does not arise; that if the petitioner-Company is treated as the branch of the Shriram Investments ltd., the damage is payable by the Shriram Investments

Ltd. Only and the branch cannot be liable to pay the damage amount and hence would pray for the relief extracted supra.

7. In support of his submissions, learned counsel for the petitioner has relied on the decision reported in NEW PAI SALES CORPORATION vs. R.P.F. COMMISSIONER (VOLUME 88 F.J.R. 323) and referred particularly page 329 paragraph 2 and page 326 paragraph 1.

8. Learned counsel appearing for the respondents, not only filed a counter, but also submitted that the petitioner himself has admitted in the affidavit that it is a sister concern (paragraphs 3 and 4 of the affidavit); that because of the petfitioner's request, the sub code was allotted and the petitioner has paid all the provident fund dues from October, 1988 to February, 1996, based on the order of the Provident Fund authorities without any protest; that the petitioner has not challenged the allotment of sub code number or applicability of the Act before any Authority; that if the petitioner has any objection, they can raise before the Provident Fund authorities under Section 7A of the Act; that as they have no objection, the sub code was allotted as per Section 2A of the Act; that there is functional integrality; that the petitioner's contention of keeping the amount in a separate Bank account without any yield instead of remitting it into the Employees Provident Fund Account has only resulted in heavy loss to the employees as well as to the respondent-organization; that even for transferring the amount kept in Bank, the petitioner has taken considerable time, thereby render themselves liable for statutory rate of damages as provided under para 32A of the Employees Provident Fund Scheme, 1952; that the damages are levied only on belated remittances of employees provident fund dues and not on remittances made within the due dates; that since the petitioner has no case against the coverage, the issue had not been disputed under Section 7A of the Act; that the petitioner failed to remit the amounts deducted from the wages of the employees in time; that it is mandatory on the part of the respondents to levy damages invoking the provisions of Section 14-B of the Act inasmuch as this respondent has already credited the interest to each subscriber account as if the contribution had been received in time and hence to offset the loss suffered by the fund, damages are inevitable; that the petitioner has not exhausted the appeal remedy available with Employees Provident Fund Appellate Tribunal under Section 7(I) of the Act and on these averments, the respondents would seek for dismissal of the writ petitions.

9. In support of his submissions, learned counsel for the respondents has relied on the decisions reported in R.P.F. COMMR. vs. S.D. COLLEGE & OTHERS (II L.L.J. 1997 PAGE 55), particularly page 72 paragraph 9, UJWAL TRANSPORT AGENCY v. U.O.I. & ANR. (1998 II L.L.J. 833), particularly page 836 paragraphs 9,10,11 and AJANTA OFFSET & PACKAGING LTD. v. REGIONAL P.F. COMMR. (2004-II L.L.J. 915, particularly page 917 paragraph 11.

10. So far as the judgments cited on the part of the writ petitioner are concerned, they are two in number; the first decision rendered in SHANTHI GARMENTS Vs. REGIONAL PROVIDENT FUND COMMISSIONER (Volume 101 F.J.R. 997); and the second decision relating to NEW PAI SALES CORPORATION

vs. R.P.F. COMMISSIONER (Volume 88 F.J.R. 323).

11. So far as the first decision cited above on the part of the counsel for the petitioner is concerned, wherein it is held, "As observed by the Supreme Court, the direction regarding payment of damages is compensatory as well as penal in nature. Where there is no wilful violation, the quantum of damages should be more or less compensatory in nature and where the default is continuous or intentional, damages payable in addition to being compensatory would be penal as well. The delay in making payments obviously should not prejudice the employees for whose benefit the fund is created. Where " Default" is found, but no apparent "fault", the quantum of damages should be compensatory rather than penal in nature."

12. In the second judgment cited above, a single Judge of the High Court of Karnataka citing yet another judgment rendered in ISHA STEEL TREATMENT, BOMBAY v. ASSOCIATION OF ENGINEERING WORKERS, BOMBAY(71 F.J.R. 11 at page 18 : 1987 I L.L.J.427) would hold :
" It was, however, argued in this case on behalf of the workmen that since the provident fund accounts of the employees and the Employees' State Insurance accounts of the two units had common numbers with the authorities concerned and settlements containing similar terms (Copies which are not produced before us) had been entered into in 1974 between the management and the workmen of the two units, it should be held that the two units had functional integrality between them. We are of the view that even these factors are not sufficient to hold that the two units were one and the same notwithstanding the fact that the nature of the business carried on in them was the same. In Indian Cable Co. Ltd., Vs. Its workmen, [1962] 22 FJR: [1962] 1 LLJ 409, this court has held that the fact the balance sheet was prepared incorporating the trading results of all the branches or that the employees of the various branches were treated alike for the purpose of provident fund, gratuity, bonus and for conditions of service in general, could not lead to the conclusion that all the branches should be treated as one unit for purposes of Section 25-G of the Act."

13. In the first decision cited by the counsel for the respondent in R.P.F. Commissioner Vs. S.D. College & others (1997 II LLJ 55), wherein it is held in paragraph 9 as follows:
"Under these circumstances, we do not think that there is any justification in the contention for waiver of the penalty imposed by the Regional Provident Fund Commissioner. As held earlier, there is no discretion left to the Commissioner to totally waive the penalty. What was left to his discretion is the rate at which it is to be computed by way of penalty. In this case, admittedly, 25 per cent of the damages was computed as penalty. Since the respondent had deposited the amount in fixed deposit and it earned 9

per cent interest thereon, the balance amount is required to be deposited and the respondent is directed to deposit the balance amount within six weeks from today."

14. In the second decision cited by the counsel for the

respondent in Ujwal Transport Agency, Madras Vs. Union of India and another (19 98 II LLJ 833), wherein it is held in paragraph 11 as follows:

"A reading of the above provision makes it clear that the nature of the levy is punitive and as the Officer is required to consider the facts of each case, while exercising his discretion under the Act, it would require an enquiry in consonance with the principles of natural justice. While imposing damages, the intention in enacting Section 14-B is to enable the Government to impose exemplary or punitive damages. But damages cannot be levied when the employer has already paid the contribution amount though under protest. The expression 'damage' occurring in Section 14-B is in substances, a penalty imposed on the employer for the breach of the statutory obligation. The object of imposition of penalty under Section 14-B is not merely to provide compensation for the employees, but also to penalise default employer as also to provide reparation for the amount of loss suffered by the employees. The damage referred to under Section 14-B is different from fine and penalty and is intended to compensate the loss to the beneficiaries of the Scheme."

15. In the last decision cited by the counsel for the respondent in Ajanta Offset & Packaging Ltd., Vs. Regional Provident Fund Commissioner (2004 II LLJ 915), wherein it is held in paragraph 11 as follows:

"Insofar as the applicability of the provisions of the Act is concerned, the provisions apply proprio vigore and all that the respondent is required to do is to allot a code of number to the petitioner. It is true that the code number was allotted only on May 27, 1974 but there is nothing to show that immediately thereafter the petitioner made some payments towards its provident fund dues. Consequently, even if there was some delay on the part of the respondent in allotting a code number that will not absolve the petitioner of its liability under the Act, which, as mentioned above applies proprio vigore."

16. In consideration of the facts pleaded, having regard to the materials available on record and upon hearing the arguments of the learned counsel for the petitioner and the respondent as well, this court is able to find that the petitioner finance company has come forward to file the above two writ petitions, in the first one in W.P.No.974 5 of 1997 praying to quash the Regional Provident Fund Commissioner's order dated 12.6.1997 and in the second writ petition in W.P.No.974 6 of 1997 praying to quash the order of the respondent dated 16.10.1 995, consequently to direct the respondent to treat the petitioner as an independent establishment for the purpose of coverage under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952.

17. The main contention of the learned counsel for the petitioner is that in spite of having made sevaral requests and repeated reminders sent to the respondent to allot a separate code number treating the petitioner company as an independent unit, the respondent refused to allot the same resulting in the company applying for a sub code number with effects from 14.10.1998 and thereafter the petitioner company started remitting the

provident fund contributions with a delay of five months and on this account the respondent issued a show cause notice dated 7.10.1996 questioning as to why the damages should not be levied under Section 14-B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 for the belated remittance of provident fund contribution, it is only testifying the validity of the order passed by the respondent dated 16.10.1995, whereby the petitioner company has been treated as the branch of the main unit and part and parcel of the same, which is already functioning under a different code TN/19904/ Sriram Investments, Madras-4 and further allotting a new code number TN/19904-A enrolling of the eligible employees from the respective date of eligibility and submitting of the statutory returns and remitting the dues further cautioning that any delay that all belated remittances would attract levy of damages as prescribed under Section 14-B of the said Act, which is impugned in the above first writ petition and the order passed by the respondent dated 12.6.1997 thereby levying the very damages to the tune of Rs.4,29,169/-, which is challenged in the above second writ petition.

18. It needs to be discussed the aspect i.e., the request made on the part of the petitioner to allot separate code number treating the petitioner as an independent unit, but this request has been turned down by the respondent authority giving instances in both the orders passed above. Factually dealing with the same and concluding that there has been functional integrality in between the sub unit and the parent unit and therefore this functional integrality being the test to arrive at the conclusion, whether the petitioner should be treated as separate unit distinct and different from the main unit or should it be considered as part and parcel of the main unit and in so far as the facts and circumstances encircling the whole affair is concerned with the sphere of activities of the petitioner unit it has been factually concluded by the authority that there is functional integrality in between the sub unit and the main unit and therefore they have been treated as part and parcel of the same company for the purpose of the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

19. Secondly, it is the levy of damages as it is ordered by the order impugned in the second writ petition under Section 14-B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

20. All the decisions cited on the part of the petitioner and the respondent, the relevant passages of which are extracted supra, would only be focussed to the effect that if belated remittances are made on the part of the employer, the authority is empowered to levy such damages and such levy could only vary in terms of the degree relating to the period of delay and whether factually damages or penal damages, depending upon the circumstances of each case, could be ordered under Section 14-B of the Act. Therefore, there cannot also be any serious objection raised on the part of the petitioner nor the same is sustainable under law as though for such levy of damages, the respondent is not empowered to pass orders or levy damages as it could be seen from the orders of the respondent impugned in both the above writ petitions, particularly in the second writ petition above, so as to be termed as arbitrary or unreasonable or even without jurisdiction. The levy of damages was cautioned in the above first writ petition and ordered in the

second writ petition by the order impugned therein and they are quite legal and enforceable and this Court does not find any valid or tangible reason existing either in the orders passed, which are impugned in both the above writ petitions or the manner in which the same have been passed by the respondent and therefore the interference of this court sought to be made by the petitioner in both the above writ petitions are neither necessary nor warranted in the facts and circumstances of the case and in law and hence the following order.

In result,

(i) For the above discussions held both the writ petitions do not merit acceptance but they become only liable to be dismissed and are dismissed accordingly;

(ii) the order passed in Ref.No.TN/19904-A/SDC-2/97 dt. 12.6.1997 in W.P.No.9745 of 1997 and the other order passed in Ref.No.D5/TN/MS/19904-A/REGL/95 dated 16.10.1995 by the respondent herein are hereby confirmed;

(iii) consequently, connected W.M.P.No.15507/1997 is also dismissed;

(iv) However there shall be no order as to costs.

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Index:Yes
Internet:Yes

Copy to
The Regional Provident Fund Commissioner,
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